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Supreme Court, U.S.
FILED
AUG 17 1994
OFFICE OF THE CLERK

No. 93-2032

In the Supreme Court of the United States

OCTOBER TERM, 1994

CLAIR B. KINTER AND ROYDEN E. KINTER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

LORETTA C. ARGRETT
Assistant Attorney General

RICHARD FARBER
S. ROBERT LYONS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

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QUESTIONS PRESENTED

1. Whether the indefinite waivers of the statute of limitations for assessment executed by petitioners in 1980 with respect to their taxable years 1974, 1975, and 1977 were valid, thereby allowing the assessment of additional taxes for those years beyond the normal limitations period.

2. Whether summary judgment was properly granted to the United States with respect to petitioners' claim that certain income received by their partnership in 1975 was taxable to them in 1974 rather than in 1975.

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. A1-A2) is unpublished, but the judgment is noted at 22 F.3d 301 (Table). The order of the district court (Pet. App. A3) and the report and recommendation of the Magistrate Judge (Pet. App. A7-A13) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 1994. The petition for a writ of certiorari was filed on June 15, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. From 1974 through 1977, petitioners Clair Kinter and Royden Kinter each owned a 50% interest in Marion Center Mining Company (MCM), a strip-mining partnership. In 1975, petitioners each purchased a 9.9% interest in DTAS, a limited partnership formed in 1975 to purchase an Italian movie entitled "Down the Ancient Staircase" (C.A. App. 401a).

Petitioners filed timely income tax returns for 1974, 1975 and 1976. Those returns were audited by the Internal Revenue Service. On audit, the Commissioner disallowed various deductions claimed by MCM. Notices of deficiency in 1974 taxes were thereafter issued to petitioners, who then filed a petition in the Tax Court for redetermination of the asserted deficiencies. While 1974 was the only year before the Tax Court on that petition, the same deduction challenged by the IRS for 1974 also affected petitioners' 1975, 1976 and 1977 tax years. The IRS therefore suspended further action on the audits and forwarded for petitioners' signature proposed form waivers of the statute of limitations for those years (Pet. App. A8).

In 1980, petitioners each signed a Form 872-A, Special Consent to Extend the Time to Assess Tax, for the year 1976 (Pet. App. A8, A21, A23). The Forms 872-A were signed on behalf of the Secretary of the Treasury by a duly authorized delegate. These agreements specified that the amount of any federal income tax for 1976 could be assessed on or before the 90th day after (*id.* at A21, A23):

> (a) the Internal Revenue Service office considering the case receive[d] Form 872-T, Notice of Termination of Special Consent to Extend the Time to Assess Tax, from the taxpayer(s); or

(b) the Internal Revenue Service mail[ed] Form 872-T to the taxpayer(s); or

(c) the Internal Revenue Service mail[ed] a notice of deficiency for such period(s).

2. On September 12, 1980, the IRS and petitioners' attorney entered into a stipulation regarding the pending Tax Court case for petitioners' 1974 tax year. That stipulation was based on a determination that the deductions claimed by MCM for 1974 were valid. Shortly after entry of the stipulated decision, petitioner Clair Kinter signed a Form 872-A for 1975 and petititoner Royden Kinter signed Forms 872-A for 1975 and 1977 (Pet. App. A25, A27, A29; C.A. App. 114a, 117a, 118a, 119a).[1]

The audit of petitioners' 1975 and 1977 tax returns was reactivated in 1987 (Pet. App. A8). In 1988 and 1989, the IRS determined deficiencies in petitioners' taxes for 1974 and 1975 and in petitioner Royden Kinter's taxes for 1977 (*ibid.*; C.A. App. 10a, 56a, 216a-221a, 222a, 238a-243a).[2] These deficiency determinations were based, among other things, upon (i) disallowance of loss deductions petitioners had claimed with respect to their investment in DTAS and (ii) petitioners' failure to

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[1] In 1978, petitioners each signed a Form 872, Consent Fixing Period of Limitation Upon Assessment of Tax, which extended the period for assessing their 1975 taxes until December 31, 1980 (C.A. App. 110a, 111a). The validity of the Form 872 signed in 1978 is not at issue in this case.

[2] The 1974 tax year remained open because the deficiency resulted from a net operating loss carried back from 1976, a year for which Forms 872-A had been executed (C.A. App. 115a, 116a). Under the stipulated Tax Court decision for 1974, the IRS remained free to assess a deficiency for 1974 if a net operating loss had been erroneously carried back to that year (*id.* at 114a).

include in their income for 1975 the amount of $74,750 received by MCM from sales during that year.

3. Petitioners paid the tax and interest due and filed refund actions in district court. Petitioners asserted that the assessments were barred by the statute of limitations because (i) the Forms 872-A they executed had expired before these assessments were made and (ii) the Forms 872-A were void *ab initio* because petitioners did not fully understand the terms of their waiver at the time they executed the forms.

The magistrate judge filed a report recommending that summary judgment be granted to the government (Pet. App. A7-A13). The magistrate first rejected petitioners' argument that the Forms 872-A expired under its terms upon the lapse of a "reasonable * * * time" (*id.* at A11):

> [C]ourts that have addressed the effect of Form 872-A are uniform in holding that Form 872-T is the only method by which a taxpayer can terminate the waiver and that there is no implied condition, either in law or in fact, that the Form 872-A waivers automatically expire of their own violation after a "reasonable period of time." It is, as the government contends, an indefinite waiver.

The magistrate also rejected petitioners' alternative claim that the waivers were "invalid because they did not subjectively understand the nature and scope of the waiver" (*ibid.*):

> [T]he tax cases are clear that what the parties subjectively believe or intend is no substitute for what was objectively stated. "[I]t is the objective manifestation of mutual assent as evidenced by the parties' overt acts, not the parties' intentions, that we must take into account in deciding whether the

> parties have reached an 'agreement' to extend the limitations period."

The district court adopted the report and recommendation of the Magistrate (Pet. App. A3, A6). The court of appeals affirmed without opinion (*id.* at A1-A2).

ARGUMENT

The decision in this case is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. The statutory period of limitations on the assessment of tax is contained in 26 U.S.C. 6501. In general, except as otherwise provided in that Section, the Commissioner may assess the amount of an internal revenue tax payable by return "within 3 years after the return was filed" (26 U.S.C. 6501(a)). The statute further provides, as an exception to its general rule, that the Commissioner and the taxpayer may agree to extend the normal three-year limitations period (26 U.S.C. 6501(c)(4)):

> Where, before the expiration of the time prescribed in this section for the assessment of any tax imposed by this title, * * * both the Secretary and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

The IRS uses two forms for waivers of the statute of limitations. The first type of waiver, Form 872, expires on a stated date. The second type, Form 872-A, waives the statute of limitations for an indefinite period of time.

The taxpayer may, however, terminate a Form 872-A agreement at will by mailing a Form 872-T to the appropriate office of the IRS.

An agreement by a taxpayer consenting to an extension of the statutory period of assessment is not a contract. It is "a voluntary, unilateral waiver of a defense by the taxpayer." *Stange* v. *United States*, 282 U.S. 270, 276 (1931). See also *Florsheim Bros. Drygoods Co.* v. *United States*, 280 U.S. 453 (1930). Because Section 6501(c)(4) "refers only to time, and leaves the parties free to decide for themselves the terms on which an extension will be granted" (*Pursell* v. *Commissioner*, 38 T.C. 263, 278 (1962), aff'd per curiam, 315 F.2d 629 (3d Cir. 1963)), however, contract principles remain significant. *Estate of Camara* v. *Commissioner*, 91 T.C. 957, 959 (1988); *Kronish* v. *Commissioner*, 90 T.C. 684, 693 (1988); *Piarulle* v. *Commissioner*, 80 T.C. 1035, 1042 (1983).

Petitioners' primary contention (Pet. 10-13) is that the waivers of the statute of limitations executed by them were void *ab initio* because in executing the Forms 872-A they did not understand that the limitations period would remain open indefinitely until they acted to terminate the waiver agreement by filing a Form 872-T with the IRS. There is no authority for petitioners' assertion. A taxpayer who executes a plain and unambiguous written agreement to extend the statute of limitations on assessment may not challenge his waiver on the grounds that he did not fully understand the consequences of his undertaking. A taxpayer is bound by the objective terms of his extension agreement; any asserted, subjective misunderstanding of those terms by the taxpayer is not relevant. See *Amesbury Apartments, Ltd.* v. *Commissioner*, 95 T.C. 227, 241 (1990); *Schulman* v. *Commissioner*, 93 T.C. 623,

639 (1989); *Woods* v. *Commissioner*, 92 T.C. 776, 780 (1989); *Kronish* v. *Commissioner*, 90 T.C. 684, 693 (1988); *Piarulle* v. *Commissioner*, 80 T.C. 1035, 1042 (1983); *Harber* v. *Commissioner*, 64 T.C.M. (CCH) 1510, 1512-1513 (1992); *Aronson* v. *Commissioner*, 62 T.C.M. (CCH) 1109, 1113 (1991), aff'd, 989 F.2d 105 (2d Cir. 1993); *Conway* v. *Commissioner*, 60 T.C.M. (CCH) 1260, 1262 (1990); *Ribb* v. *Commissioner*, 55 T.C.M. (CCH) 1597, 1600 (1988).

2. Petitioners contend in the alternative (Pet. 15-19) that the indefinite term of their Form 872-A waivers expired before the assessments were made because such a waiver is valid only for "a reasonable period of time." The courts have consistently rejected that contention. By its terms, a Form 872-A continues in effect until terminated by either the taxpayer or the IRS in one of the methods prescribed therein. Because the taxpayer may terminate a Form 872-A agreement at will, simply by sending a Form 872-T to the IRS, the courts have concluded that there is no basis for grafting an implied limitation on its duration. Instead, it has consistently been held that Form 872-T is the taxpayer's *exclusive* method of terminating the waiver and that the waiver does not impliedly terminate after a "reasonable time."[3] See *St. John* v. *United States*, 951 F.2d 232, 235 (9th Cir. 1991); *Kernen* v. *Commissioner*, 902 F.2d 17 (9th Cir. 1990); *Wall* v. *Commissioner*, 875 F.2d 812 (10th Cir.

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[3] The 1930 decision in *Pictorial Printing Co.* v. *Commissioner*, 38 F.2d 563 (7th Cir.), on which petitioners rely (Pet. 18), is inapposite. The extension agreement involved in that case differed from the modern Form 872-A agreements in that it did not provide any means for the taxpayer to terminate the agreement. The analysis of *Pictorial Printing Co.* is therefore inapplicable to this case. See *Stenclik* v. *Commissioner*, 907 F.2d 25, 28 (2d Cir.), cert. denied, 498 U.S. 984 (1990).

1989); *Kinsey* v. *Commissioner*, 859 F.2d 1361, 1362-1364 (9th Cir. 1988), cert. denied, 489 U.S. 1083 (1989); *Estate of Camara* v. *Commissioner*, 91 T.C. 957 (1988).

3. Petitioners further contend (Pet. 24-28) that the award of summary judgment to the government on the merits of the underlying tax dispute was improper. Petitioners failed, however, to bring forth evidence to support their assertion that the sum of $74,750 received by the MCM partnership in 1975 was taxable to petitioners in 1974 (as petitioners assert) rather than in 1975 (as the assessment determined). Petitioners contend that MCM was an accrual basis partnership and that the amount in question was earned in 1974 even if not received until 1975. Petitioners did not, however, produce any books or records to support this claim (Pet. 25). It was petitioners' burden to establish that they had overpaid their taxes for 1975 and were entitled to a refund. See *United States* v. *Janis*, 428 U.S. 433, 441 (1976); *Helvering* v. *Taylor*, 293 U.S. 507, 515 (1935); *Welch* v. *Helvering*, 290 U.S. 111, 115 (1933); *Anastasato* v. *Commissioner*, 794 F.2d 884, 886 (3d Cir. 1986). Because the receipt of income is a sufficient evidentiary basis to support an assessment of tax, summary judgment was properly granted to the United States. In any event, this inherently factual issue does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

LORETTA C. ARGRETT
Assistant Attorney General

RICHARD FARBER
S. ROBERT LYONS
Attorneys

AUGUST 1994